INDEX

CITATIONS

278258—53——1

Statutes:

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 449

UNITED STATES OF AMERICA, PETITIONER

v.

MEAD GILMAN, JR.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Acting Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above case on August 3, 1953.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of California (R. 26–29) is not reported. The opinions of the Court of Appeals (R. 52–59) are reported at 206 F. 2d 846.

JURISDICTION

The judgment of the Court of Appeals was entered on August 3, 1953 (R. 59). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the United States may recover indemnity from a Government employee for whose negligence the Government has been held liable under the Federal Tort Claims Act.

STATUTE INVOLVED

The pertinent portions of the Federal Tort Claims Act read as follows:

> 28 U. S. C. 1346 (b).
>
> Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.
>
> 28 U. S. C. 2676.
>
> The judgment in an action under section 1346 (b) of this title shall constitute a com-

plete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

STATEMENT

An action was brought against the United States by one Darnell under the Federal Tort Claims Act (28 U. S. C. 1346 (b)) for injuries arising from an automobile accident involving vehicles of Darnell and the Government (R. 3–7). Respondent, an employee of the United States Coast and Geodetic Survey, Department of Commerce, was the driver of the Government car (R. 8). The Government moved under Rule 14 (a), Federal Rules of Civil Procedure,[1] for leave

[1] "Before the service of his answer a defendant may move ex parte or, after the service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. If the motion is granted and the summons and complaint are served, the person so served, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence

to implead respondent as a third-party defendant (R. 17–19).[2]

Upon the granting of this motion, a third-party complaint was filed, asking that if the United States should be held liable to the plaintiff it have indemnity against respondent for the full amount of its liability (R. 20–21). Respondent moved to dismiss the third-party complaint; but the district court denied the motion on the ground that, under the accepted principles of the California law of master and servant, an employer is entitled to indemnity for liability caused by his employee's negligence (R. 25–29). Upon a trial, the district court found that the plaintiff's injuries were caused solely by the negligence of respondent acting within the scope of his employment as an employee of the United States, and accordingly gave judgment against the United

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that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant."

[2] Respondent, together with the Coast and Geodetic Survey, had been named with the United States as defendants in the plaintiff's original action. Subsequently, and before the motion to bring in respondent as third-party defendant, the action was dismissed as to both of these defendants, with the consent of the plaintiff (R. 11–16). No issue is here presented as to the propriety of these dismissals.

States under the Tort Claims Act for $5,500, with judgment over for the United States against respondent, the third-party defendant, for the same amount (R. 34–44).

The respondent appealed, contending (1) that under the doctrine of *United States* v. *Standard Oil Co.*, 332 U. S. 301, which held that the Government had no cause of action in tort for the loss of the services of a soldier injured by the negligence of the defendant, the common law action for indemnity could not be extended by the courts to the United States; and (2) that the action was barred under that section of the Tort Claims Act (28 U. S. C. 2676, *supra*, pp. 2–3), which provides that a judgment against the Government shall constitute a bar to an action by the injured person against the employee.

The court of appeals, in a 2–1 decision, reversed (R. 52–57). It held that 28 U. S. C. 2676, although by its terms it barred only actions by the injured claimant and not indemnity actions by the Government, nevertheless constituted an indirect bar. The court reasoned as follows: The cause of action for indemnity is based on the principle that the employee is unjustly enriched by an action against the employer under the doctrine of *respondeat superior*, resulting in the employer's satisfying a liability which is the primary responsibility of the employee. Since by virtue of 28 U. S. C. 2676 the entry of a judgment

against the Government, unlike the entry of judgment against a private employer, relieves the employee of further responsibility, the Government's payment of such a judgment cannot be said unjustly to enrich the employee. The court did not pass upon respondent's contention that the action was barred by the rule of the *Standard Oil* case (R. 56).

Judge Harrison, sitting by designation, dissented (R. 57). He urged that *United States* v. *Yellow Cab Co.*, 340 U. S. 543, in which this Court stated that the Government was entitled to contribution from joint tortfeasors (see *infra*, pp. 10–11), was controlling. He also urged that the Government should not be treated differently from private employers and that the rule established by the majority would encourage collusion between employees and injured claimants.

REASONS FOR GRANTING THE WRIT

The question presented is a continuing one of general importance in the administration of the Tort Claims Act. It is of potential significance in every case, now or in the future, under that Act.[3] We believe that the decision of the court

[3] Although it is open to the Government to seek indemnity in every case arising under the Act, the practice of the Government has been to restrict such claims, usually to situations in which the employee at fault is covered by liability insurance.

In the present case, a regulation of the United States Coast and Geodetic Survey contemplated that employees would

below is erroneous, conflicting with the philosophy of the Tort Claims Act and with the rationale of this Court's decision in *United States* v. *Yellow Cab Co.*, 340 U. S. 543. This Court should establish the correct rule for the entire country.

1. In claiming indemnity from its employees the Government is asserting a long established common law right of all employers. The common law right of an employer to be indemnified by its employee against liability under the doctrine of *respondeat superior* for the negligence of the employee is too well settled to require elaboration. See *e. g., Washington Gas Light Co.* v. *District of Columbia,* 161 U. S. 316, 328; *Brown & Root* v. *United States,* 92 F. Supp. 257, 262 (S. D. Tex.); *Johnston* v. *City of San Fernando,* 35 Cal. App. 2d 244, 246, 95 P. 2d 147; *Stulginski* v. *Cizauskas,* 125 Conn. 293, 296, 5 A. 2d 10, 12; *Grand Trunk Ry. Co.* v. *Latham,* 63 Me. 177; Restatement, *Agency* § 401, comment c. The rationale of this cause of action is that the employer, having done no

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carry insurance covering their driving of Government vehicles. It provided (U. S. Coast & Geodetic Survey Regulations, par. 1080):

"TRAFFIC REGULATIONS—

* * * * *

"(b) The chief of party is authorized to require all employees operating trucks of the Bureau to obtain, at the operator's expense, a limited form of liability insurance as protection from personal liability for damage incurred while driving Government vehicles. Additional information regarding this matter may be obtained from the Washington office."

278258—53——2

tortious act, has only a secondary liability arising by imputation of law, and that the primary liability rests on the employee who has done the negligent act. Cf. *City of Chicago* v. *Robbins,* 2 Black 418; *George A. Fuller Co.* v. *Otis Elevator Co.,* 245 U. S. 489; *Oceanic Steam Nav. Co.* v. *Compania Transatlantica Espanola,* 134 N. Y. 461, 31 N. E. 987; *Boston Woven Hose & Rubber Co.* v. *Kendall,* 178 Mass. 232, 59 N. E. 657. The nature of the action against the employee is quasi-contractual; the employer, having satisfied a liability which is the primary responsibility of the employee, has thereby conferred a benefit upon the employee and is entitled to recover, in an action on a contract implied in law, the amount by which the employee is thus unjustly enriched. See, *e. g.,* Restatement, *Restitution* § 76; Woodward, *Quasi Contracts* (1913), §§ 258–259; *Brown & Root* v. *United States,* 92 F. Supp. 257, 261 (S. D. Tex.).

In asserting this right under the common law, the Government seeks only to be placed in the same position as a private employer in like circumstances. Such an assertion accords with the intention of Congress in enacting the Tort Claims Act. The Act provides that "the United States shall be liable * * * in the same manner and to the same extent as a private individual under like circumstances" (28 U. S. C. 2674). Whether the Government has the right to recover indemnity bears directly on the "manner" and

"extent" of the Government's liability; to create liability while denying the right to seek indemnity subjects the United States to a greater burden than that imposed upon private individuals in like circumstances.

The legislative history of the Tort Claims Act, beginning with the tort claims bills in the 76th Congress and continuing down to its enactment in the 79th Congress (see *Dalehite* v. *United States,* 346 U. S. 15, 24–30), reveals continual modification in a direction away from statutory enunciation of particular rights and liabilities—once jurisdiction over the type of suit has been acquired—and toward reliance upon accepted principles of general law, to be applied by the courts without express statutory definition or circumscription.[4] This process of evolution indi-

[4] Thus, a provision limiting the Government's liability in cases involving joint tortfeasors to a pro rata share of the damages was eliminated, and the matter of contribution left to the courts (compare H. R. 6463 and S. 2221, 77th Cong., 2d Sess., with H. R. 181, 79th Cong., 1st Sess.); specific provisions for the distribution of proceeds of wrongful death actions, for the defense of contributory negligence, for aggravation of damages, and for payment of the amount of the judgment when the claimant dies pending disposition of his claim, were dropped, and the questions left to local law (see Hearings Before House Committee on the Judiciary on H. R. 5373 and H. R. 6463, 77th Cong., 2d Sess., p. 27); and express procedural provisions in matters such as pretrial depositions and physical examinations were dropped in favor of reliance on the Rules of Civil Procedure. See Memorandum for Use of the Committee on the Judiciary Explanatory of H. R. 5373, 77th Cong., 2d Sess., p. 26.

cates the Congressional purpose to leave as much as possible of the substantive principles to be applied under the Act to the ordinary rules of law, and to provide expressly only for the minimum requirements. The absence from the Act of express reference to a right of indemnity is thus accounted for by the broad provision assimilating the United States to a private individual, which covers such a right along with others.

In a similar vein, despite the absence of a specific provision covering the question of contribution among joint tortfeasors, this Court has held, as a part of the rationale of *United States* v. *Yellow Cab Co.*, 340 U. S. 543, that, where the negligence of a government employee and that of a private individual concur in causing damage, the United States would be entitled to contribution from the joint tortfeasor if the law of the place permitted.[5] The precise issue presented in the *Yellow Cab* case was whether a private individual could recover contribution from the United States. But as part of its reasoning the Court stated (340 U. S. at 551): "Of course there is no immunity from suit *by* the Government to

[5] The right of indemnity, we believe, should depend not on the law of the place but on federal common law. Unlike actions for contribution, actions for indemnity arising out of actions under the Tort Claims Act involve no private individuals, but only the relationship between the Government and its employees. This relationship is distinctively federal. Cf. *United States* v. *Standard Oil Co.*, 332 U. S. 301, 305–311. The court below correctly so held (R. 56).

collect claims for contribution due it from its joint tort-feasors." This holding should be extended to the comparable situation presented by this case.

2. The court below, not denying the force of the foregoing arguments, held the action barred by an express provision of the Tort Claims Act, *i. e.*, 28 U. S. C. 2676. This view is, we think, erroneous. 28 U. S. C. 2676 reads as follows:

> The judgment in an action under section 1346 (b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

By its very terms this section refers only to the rights of injured claimants and has no bearing on the Government's rights against its employees. Moreover, its primary purpose was to protect not employees but the Government. In enacting it, Congress was concerned with the fact that in many cases the Government would be compelled, in the interests of morale and good relations with its employees, to defend actions brought by injured claimants directly against the employees. Enactment of the Tort Claims Act would then subject the Government to the necessity of twice defending actions based on the same injury, once on behalf of the employee and once on its own behalf. It was thought desirable to prevent duplicate actions against both the Government and

the employees. See *e. g.*, Hearings Before House Committee on the Judiciary on H. R. 5373 and H. R. 6463, 77th Cong., 2d Sess., pp. 9–10.[6] The provision making a judgment in a suit under the Act a bar to a subsequent action against the employee would, it was believed, tend to cause all actions to be brought under the Tort Claims Act and to eliminate suits against the employee directly, since the holder of a judgment against the Government is assured of satisfaction. But nothing in the legislative history suggests the clear purpose on the part of Congress to deny indemnity which would be necessary to require a decision in derogation of the Government's common law right, where for administrative reasons the Government chooses to assert its right. Certainly, there is no legal bar to suits against the employee where the injured person chooses for any reason to proceed against him rather than against the Government. Both before and after enactment of the Tort Claims Act employees of

[6] In testifying in the House committee on this aspect of the bill in the 77th Congress, a representative of the Department of Justice suggested that, in his view, the Government would have no right of indemnity and would be left to its remedy of firing the negligent employee or taking other disciplinary action. See Hearings, *supra* at p. 10. This suggestion also appeared in S. Rept. No. 1196, 77th Cong., 2d Sess., p. 5. However, this testimony was given without reference to the situation of insured employees (see fn. 3, *supra*, pp. 6–7) and was not rested on any prohibition or provision in the Act.

the Government have been subject to suit for their own negligence. See 40 Ops. Atty. Gen. 38, and cases cited.[7] Thus, under 28 U. S. C. 2676, the employee is merely an incidental beneficiary of a provision aimed at protecting the Government but which does not prevent suit against him until judgment is entered against the United States.

The court below did not reject these arguments. It held, however, that 28 U. S. C. 2676 had an indirect bearing. Accepting the view that the action for indemnity was based on the quasi-contractual theory that satisfaction by the employer of a judgment based on the tortious conduct of its employee confers a benefit on the employee for which the employer should receive restitution (see *supra*, pp. 7–8), the court held that 28 U. S. C. 2676 had the effect of extinguishing the benefit and thereby precluding the right of restitution. It argued that since, under the statutory provision, the entry of judgment against the Government terminated the responsibility of the employee for his own negligence, payment of the judgment no longer conferred a

[7] 40 Ops. Atty. Gen. 38 held that the Government could not administratively compel an employee to indemnity it. But this opinion is not inconsistent with our position here. Its reasoning was that to allow administrative action would deprive the employee of his day in court. Clearly, this rationale is not inconsistent with an action to recover indemnity.

benefit on the employee, the employee was not unjustly enriched, and the Government was accordingly not entitled to restitution.

This argument is fallacious. The employee is liable to suit by the injured person at any time up to the entry of judgment against the Government, and therefore the very fact that the judgment extinguishes this liability confers a decided benefit upon the employee, amounting to unjust enrichment for which he can be held accountable. The initial source of this benefit was the enactment of the Tort Claims Act and it is therefore attributable to the United States. Cf. *Terminal R. Ass'n* v. *United States,* 182 F. 2d 149 (C. A. 8).

The court below disclaimed any suggestion that its decision was based on the theory that liability for indemnity does not arise until payment of the judgment against the Government (cf. *Dunn* v. *Uvalde Asphalt Paving Co.,* 175 N. Y. 214, 67 N. E. 439) and that at the time of payment the employee is not enriched because his liability has been extinguished by the entry of judgment (see R. 55, n. 2). Moreover, such a theory is contrary to generally accepted principles of the law of restitution. Restatement, *Restitution* § 78, comment c, states the law as follows:

> A person who has become secondarily liable upon a transaction * * * because of the fault of another is entitled to resti-

> tution from the other if he performs a duty owed by him to the creditor [*i. e.*, the injured person], even though before such performance the duty of the other has terminated. * * *

This principle is illustrated by the rule that the employer may recover indemnity from the employee even though at the time of the employer's payment an action by the injured claimant against the employee was barred by limitations. Cf. *Reed* v. *Humphrey,* 69 Kan. 155, 76 Pac. 390; *Godfrey* v. *Rice,* 59 Me. 308, 310; *Sibley* v. *McAllaster,* 8 N. H. 389. Likewise, the employer is entitled to indemnity even though the injured claimant's action against the employee is barred because the employee and the injured claimant are husband and wife. See, *e. g., Schubert* v. *Schubert Wagon Co.,* 249 N. Y. 253, 257, 164 N. E. 42, 43; *Hudson* v. *Gas Consumers' Ass'n,* 123 N. J. L. 252, 254, 8 A. 2d 337, 339.

3. The court below expressly refrained (R. 56–57) from passing upon the respondent's contention, based on *United States* v. *Standard Oil Co.,* 332 U. S. 301, that the courts may not apply the public policies on which common law liabilities are based to create causes of action for the benefit of the United States. The respondent contended that, like the cause of action for the loss of the services of a soldier asserted by the Government in the *Standard Oil* case, the cause of action for indemnity involves fiscal policy and may be created

only by Congress. But it seems clear that principles laid down in that decision should not be applicable to the present case.

a. The *Standard Oil* opinion recognized that many causes of action on behalf of the United States exist without express statutory basis. It relied on *Cotton* v. *United States,* 11 How. 229, which asserted the classic principle that "as a corporation or body politic [the United States] may bring suits to enforce their contracts and protect their property" (11 How. at 231). This principle clearly covers not only actions on express contracts but also the numerous kinds of cases in which the Government is permitted to maintain actions based on various quasi-contractual obligations or contracts implied in law. Examples are, among many, the right of the United States to recover money paid by it under mistake of law or fact (*e. g., Wisconsin C. R. R. Co.* v. *United States,* 164 U. S. 190), and the right of the United States as drawee of a check to recover money paid on a forged endorsement. *E. g., Clearfield Trust Co.* v. *United States,* 318 U. S. 363; *United States* v. *National Exchange Bank,* 214 U. S. 302.

The cause of action for indemity in the present case, being quasi-contractual in theory, falls squarely within the doctrine of these cases. By its own terms, the *Standard Oil* decision amounts only to a prohibition against the creation of "new" causes of action in tort (cf. *United States* v. *Silliman,* 167 F. 2d 607 (C. A. 3), certiorari de-

nied, 335 U. S. 825); it does not apply to recognized quasi-contractual actions. See also the Government's petition for a writ of certiorari in *United States* v. *Capps,* No. 331, this Term, pp. 23–26.

b. Moreover, in *Standard Oil* the Government sought to extend the policy of the common law to a new field of tort law and was in effect asking for the creation of a new kind of right, while here it is asking only the recognition of a well settled right in an old field. There, the asserted right of action was for the loss of the services of a soldier injured by the negligence of the defendant, on the analogy of the parallel protection afforded the relationships of master and servant, husband and wife, and parent and child. But the very relationship or status for which protection was sought—the so-called Government-soldier relationship—was necessarily unique. No parallel relation could exist in private law; since the end of the feudal system only governments have had soldiers. The Government was seeking enforcement of a unique right, one necessarily lacking common law precedent, although it had common law analogues. The master-servant relationship, on the other hand, is not peculiar to the Government. The rules regarding the protection to be afforded it have been fully developed in private law. It is only necessary to provide this protection for another employer, which happens in this case to be the Government. No cre-

ation of a new cause of action is sought—only nondiscriminating application of an existing one.

c. Finally, the *Standard Oil* case rests on the consideration that Congress had long been aware of the problem of injuries to soldiers and had not seen fit to do anything about it. In the present case, apart from the fact that the problem of indemnity has existed only since the passage of the Tort Claims Act in 1946, there is evidence that Congress' failure to act arises not from a belief that the Government should not be allowed to recover, but rather from the belief that it is entitled to recover under the law as it now stands. This is the theme of reports of congressional committees studying private legislation for the relief of Government employees who have been sued for their torts by claimants electing to sue the employee rather than the Government. For example, Private Law No. 820, 82nd Congress, was a bill for the relief of the driver of a mail truck who had been held liable for negligence and who, Congress felt, had not been seriously at fault. In considering whether the equities of the situation warranted granting relief to this employee, the Senate Committee pointed out (S. Rept. No. 2025, 82d Cong., 2d Sess., p. 2):[8]

> With respect to the Government employee, in this case a postal carrier, it must

[8] It has been the practice of Congress to consider claims for reimbursement by employees who have been sued for

> be borne in mind that as between the United States and one of its employees the ultimate responsibility for the negligence of the employee rests on the employee's shoulders. Even when a judgment has been obtained under the Federal Tort Claims Act the United States has a right of action over against the employee.

Congressional inaction in this area of indemnity is thus explained by Congress' belief that no legislation is necessary to achieve the result here urged by the Government.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ROBERT L. STERN,
Acting Solicitor General.

OCTOBER 1953.

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torts committed in the course of their employment and to allow such claims where the equities warranted. *E. g.*, Pvt. L. 820, 82nd Congress. However, Congress has recognized that in a proper situation the Government might allow the burden to rest upon the employee. The action for indemnity permits this decision to be made at the instance of the executive branch rather than by the legislature. See fn. 3, *supra*, pp. 6–7.

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